A

SIA SZU LUNG

v.

KETUA POLIS NEGARA, MALAYSIA & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
LIM YEE LAN JC
[CRIMINAL APPLICATION NO: 44-64-2006]
8 SEPTEMBER 2006

C ***PREVENTIVE DETENTION:*** *Detention order - Application for habeas corpus - Applicant detained under s. 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether detention unlawful - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), (3), (5), 5(4), 6(1), 14 - Federal Constitution, art. 5(3)*

D

CONSTITUTIONAL LAW: *Fundamental liberties - Detention - Application for habeas corpus - Applicant detained under s. 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 – Whether detention unlawful - Dangerous Drugs (Special Preventive Measures) Act*
E *1985, ss. 3(1), (3), (5), 5(4), 6(1), 14 - Federal Constitution, art. 5(3)*

The applicant was ordered to be detained for a period of two years at the Pusat Pemulihan Akhlak, Simpang Renggam, Johor pursuant to a detention order issued by the Timbalan Menteri Dalam Negeri Malaysia ('Deputy Minister') under s. 6(1) of the
F Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act'). The applicant applied for a writ of *habeas corpus* against the detention order, contending that: (i) his detention was in violation of art. 5(3) of the Federal Constitution ('FC') since he was not informed of the grounds of his arrest under s. 3(1) of the Act; (ii)
G non-disclosure of the two reports specified in paras. (a) and (b) of s. 6(1) of the Act (which supposedly formed the basis of the Deputy Minister's satisfaction to detain the applicant) in the affidavit of the Deputy Minister rendered the affidavit defective; and (iii) he was denied access to one of his counsel during his
H representation proceedings before the Advisory Board, a violation of the second limb of art. 5(3) of the FC that rendered his detention unlawful.

I

Held (dismissing the application):

(1) The Act was enacted pursuant to art. 149 of the FC which allows any law enacted pursuant to the said article to supersede, *inter alia*, art. 5 of the FC. Subsections (1) and (5) of s. 3 of the Act are in *pari materia* with subsections (1) and (5) of s. 3 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Consequently, based on the Federal Court decision of *Kam Teck Soon v. Timbalan Menteri Dalam Negeri, Malaysia & Ors and Other Appeals*, by analogy, s. 3(1) of the Act does not require an arresting officer to inform a detainee of the grounds of his belief as to why the detainee has to be arrested and if art. 5(3) required him to be so informed, his detention would be deemed lawful by virtue of s. 3(5) of the Act. (para 6)

(2) It would be unnecessary, indeed illogical, for the Deputy Minister to plead in his affidavit the privilege under s. 14 of the Act in view of the fact that he was not the maker of the two reports and such privilege had already been pleaded by the respective makers of the reports, namely, the Investigating Officer under s. 3(3) of the Act and the Inquiry Officer under s. 5(4) of the Act in their respective affidavits in reply to the applicant's affidavit in support of his application. The Deputy Minister had expressly averred in para. 6 of his affidavit that he had applied his mind to the matters in the two reports regarding the activities of the applicant before issuing the order against the applicant. The Deputy Minister's averment thus satisfied the requirement of s. 6(1) of the Act and must be accepted on its face, and this court could not go behind such averment to question the subjective satisfaction of the Deputy Minister. (para 10)

(3) In the present application, it was clearly stated in para. 5 of the affidavit to the Secretary to the Advisory Board that the applicant was represented by the firm of Messrs Rama Samuel & Associates, and a legal counsel from the said firm did represent him at the proceedings before the Advisory Board. Therefore, the issue of the applicant being denied any legal representation did not arise at all. There was thus no breach of the second limb of art. 5(3) of the FC. (para 14)

Case(s) referred to:

Kam Teck Soon v. Timbalan Menteri Dalam Negeri, Malaysia & Ors & Other Appeals [2003] 1 CLJ 225 FC ***(foll)***

Lee Mau Seng v. Minister for Home Affairs, Singapore & Anor [1971] 2 MLJ 137 ***(refd)***

Mohamad Ezam Mohd Noor v. Ketua Polis Negara [2002] 4 CLJ 309 FC ***(foll)***

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 4 CLJ 47 SC ***(refd)***

Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 ***(refd)***

Sundar Singh v. Emperor [1990] AIR Lahore 945 ***(refd)***

Tee Yam v. Timb Men KDN & Ors [2005] 5 MLJ 645 ***(dist)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), (3), (5), 5(4), 6(1), 14

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), (5), 4(1)

Federal Constitution, arts. 5(3), 149

Rules of the High Court 1980, O. 41 r. 11

For the applicant - M Ramachandran; M/s Rama Samuel & Assoc
For the respondents - Senior Federal Counsel

Reported by Suresh Nathan

JUDGMENT

Lim Yee Lan JC:

[1] The applicant in this case was ordered to be detained for a period of two years at the Pusat Pemulihan Akhlak, Simpang Renggam, Johor pursuant to a detention order dated 13 February 2006 issued by the Timbalan Menteri Dalam Negeri Malaysia ('the Deputy Minister') under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316').

[2] The applicant applied for a writ of *habeas corpus* against the detention order before this court and his application was heard on 4 September 2006. Several grounds were raised in the appellant's affidavit in support of his application but during the hearing of the application only three main grounds were relied upon by the learned counsel for the applicant.

[3] After hearing the submission of Mr. T. Suresh, the learned counsel for the applicant and Encik Asnawi b. Abu Hanipah, the learned Federal Counsel for the respondents, and having perused the relevant affidavits and exhibits filed on behalf of the applicant and the respondents as well as the authorities cited by both parties, this court hereby dismiss the application based on the following reasons:

(a) On the ground that his detention was in violation of art. 5(3) of the Federal Constitution because he was not informed of the grounds of his arrest under s. 3(1) of Act 316

[4] The applicant contended that at the time of his arrest by the police on 21 December 2005, he was not informed by the arresting officer of the grounds of his arrest as was required under s. 3(1) of Act 316. It was contended that a breach of s. 3(1) of the Act is a breach of his fundamental right as guaranteed by art. 5(3) of the Federal Constitution ('art. 5(3)') the violation of which would render his arrest unlawful. Section 3(1) of Act 316 reads as follows:

> 3(1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection 6(1).

While art. 5(3) provides that:

> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[5] In regard to this issue this court is guided by the Federal Court's decision in the case of *Kam Teck Soon v. Timbalan Menteri Dalam Negeri, Malaysia & Ors and Other Appeals* [2003] 1 CLJ 225 which was a case concerning a detention under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') in which the Federal Court has the occasion to discuss the first limb of art. 5(3). In that case, on a similar issue raised by the appellants therein under s. 3(1) of the Ordinance (which is in *pari materia* with s. 3(1) of Act 316) the Federal Court, by a majority decision, held, *inter alia*, that:

A (1) On a proper construction of section 3(1) of the Ordinance, all that it requires is that the arresting officer must have reason to believe that there are grounds to detain the person. The said subsection does not require the arresting officer to inform the arrested person of the grounds of his belief;

B (2) Section 3(5) of the Ordinance further states that a person detained under section 3(1) shall be deemed to be in lawful custody. Therefore, even if art. 5(3) applies to an arrest under section 3(1) and subsequent detention under section 5(3) of the Ordinance, the effect of section 3(5) is to render lawful any C unlawful detention due to a breach of section 3(1) and art. 5(3).

[6] Act 316 was enacted pursuant to art. 149 of the Federal Constitution which allows any law enacted pursuant to the said article to supercede, *inter alia*, art. 5 of the Constitution. Subsections 3(1) and 3(5) of Act 316 are in *pari materia* with D subsections 3(1) and 3(5) of the Ordinance. Consequently, based on the decision in *Kam Teck Soon*, this court was of the opinion that, by analogy, s. 3(1) of Act 316 does not require an arresting officer to inform a detainee of the grounds of his belief why the detainee has to be arrested and if art. 5(3) require him to be so E informed, his detention would be deemed lawful by virtue of subsection 3(5) of the Act. In the premises I found this ground to be without merit.

(b) On the ground that non-disclosure of the two reports F specified in paras (a) and (b) of s. 6(1) of Act 316 in the affidavit of the Deputy Minister renders the affidavit defective

[7] The challenge on this ground relates to the alleged failure of G the Deputy Minister to exhibit in his affidavit in encl. (13) the two reports specified in paras (a) and (b) of s. 6(1) of Act 316 which supposedly formed the basis of his satisfaction to detain the applicant for a period of two years under the said Act. It was contended on behalf of the applicant that, based on the decision H in *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 4 CLJ 47, an application for a writ of *habeas corpus* is heard by way of affidavit evidence and hence there must be compliance with the rules of the High Court relating to affidavit evidence, one of which is r. 11 of O. 41. Rule 11 of O. 41 of the I High Court Rules 1980 provides as follows:

(1) Any document to be used in conjunction with an affidavit must be exhibited and a copy thereof annexed to the affidavit.

(2) Any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn. The certificate must be entitled in the same manner as the affidavit and rule 1 (1), (2) and (3) shall apply accordingly.

[8] It was contended that r. 11 of O. 41 of the High Court Rules 1980 requires any document to be used in conjunction with any affidavit in any matter before the court to be exhibited and a copy thereof to be annexed in the manner provided in the said rule. In this case, the said Deputy Minister had averred in para 6 of his affidavit that he had relied on the two aforementioned reports when ordering the detention of the applicant. That be the case it was thus incumbent on the Deputy Minister to exhibit the two said documents on which he had purportedly based his subjective satisfaction to detain the applicant and to show that he had indeed applied his mind to the matters disclosed therein and that the detention order was not made mechanically.

[9] It was further contended that although s. 14 of Act 316 gave the right to the Deputy Minister not to disclose any document if he considered it to be against the national interest to do so, such a privilege must be expressly pleaded by him in his affidavit but in this case the Deputy Minister had failed to so. Such a failure was a substantive procedural non-compliance of Act 316 which rendered the applicant's detention unlawful.

[10] With regard to this ground, I was inclined to agree with the submission of the learned Federal Counsel that it would be unnecessary, indeed illogical, for the Deputy Minister to plead in his affidavit the privilege under s. 14 of Act 316 in view of the fact that he was not the maker of the two reports and such privilege had already been pleaded by the respective makers of the reports, namely, the investigating officer under s. 3(3) and the Inquiry Officer under s. 5(4) of Act 316 in their respective affidavits in reply to the applicant's affidavit in support of his application. The said Deputy Minister had expressly averred in para 6 of his affidavit that he had applied his mind to the matters in the two reports regarding the activities of the applicant before issuing the order against the applicant. The said Deputy Minister's averment thus satisfied the requirement of s. 6(1) of Act 316 and

must be accepted on the face of it and this court cannot go behind such averment to question the subjective satisfaction of the said Deputy Minister.

(c) On the ground that the applicant was denied representation by one of his counsels before the Advisory Board which was a violation of the second limb of art. 5(3) of the Federal Constitution

[11] In para. 23 of his affidavit in support of his application in encl. (4) the applicant averred that he was denied access to one of his counsels during his representation proceedings before the Advisory Board and this denial of his fundamental right as guaranteed under art. 5(3) of the Federal Constitution rendered his detention unlawful.

[12] In regard to this issue, this court was guided by the judgment of Siti Norma Yaakob FCJ in the case of *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara* [2002] 4 CLJ 309 in which the learned Judge had opined, in reliance on the decisions in *Lee Mau Seng v. Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137, *Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 and the Indian case of *Sundar Singh v. Emperor* [1990] AIR Lahore 945, that *habeas corpus* does not lie to secure the immediate release of a person lawfully detained under the Internal Security Act who was denied access to counsel. The relevant passage of her lordship's judgment reads as follows:

> A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art. 5(3) of the Federal Constitution will not have the effect of rendering his detention unlawful and that *habeas corpus* is not the proper remedy.

[13] On this ground the learned counsel also cited the recent decision of the Federal Court in a *habeas corpus* appeal in which the applicant was released, *inter alia*, on the ground that he was denied representation by his leading counsel in the proceedings before the Advisory Board. This court was informed that no written grounds were passed down by the Federal Court in that case. This court believed that the decision of the Federal Court referred to by learned counsel relates to an appeal from the decision of Jeffery Tan J in the Muar High Court in the case of

Tee Yam @ Koo Tee Yam v. Timb. Men. KDN & Ors [2005] 5 MLJ 645. Having perused the judgment in that case this court was of the view that the issue raised in that case was very different from this case. In *Tee Yam*'s case the allegation was that the appellant was not given a free and unlimited access to his counsels during his custody by the police as whenever he met with his legal counsels there would be a few other police officers in attendance, which was not the allegation in the present application.

[14] In the present application before this court, it was clearly stated in para. 5 of the affidavit of the Secretary to the Advisory Board in encl. (9) that the applicant was represented by the firm of Messrs Rama Samuel & Associates and a legal counsel from the said firm did represent him at the proceedings before the Advisory Board. Therefore the issue of the applicant being denied any legal representation did not arise at all. There was therefore no breach of the second limb of art. 5(3) of the Federal Constitution.

[15] Based on the foregoing reasons, this court hereby dismissed the application of the applicant for a writ of *habeas corpus.*